IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 311 of 1983

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANBI KANJI KARSAN - Appellant(s)
Versus
HEIRS OF DECEASED KESHRA HARJIKANBI MAVJI KESHRA & 2 - Defendant(s)

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Appearance :

MR AVINASH K MANKAD for Appellant(s) : 1,
MR PV HATHI for Defendant(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 12/01/2007

ORAL JUDGMENT

1. Heard Mr.Avinash K.Mankad, learned counsel for the appellant and Mr.P.V. Hathi, learned counsel for the

respondent Nos.1 to 3.

2. The appellant, being aggrieved by the judgment and decree dtd.22/4/1983 passed in Regular Civil Appeal No.64 of 1971 by the learned District Judge, Kuch at Bhuj confirming the judgment and decree dtd.31/3/1971 passed in Regular Civil Suit No. 125 of 1964 by the learned Civil Judge (J.D.) Bhuj, dismissing the suit of the plaintiff for redemption of the property mortgaged with the defendants on 26/7/1932 (Exh.92), has filed this appeal.

3. Short facts necessary for disposal of the present appeal are that one Jadeja Ranchhodji Harisangji was owner of suit field bearing Survey No.70 of village Naranpar admeasuring 12 Acres and 20 Gunthas. The said Jadeja Ranchhodji Harisangji mortgaged the said agricultural land with one Keshra Harji, Predecessor-in-title of the defendants vide Exh.92 dtd.26/7/1932. The term of the redemption of the mortgage was for 25 years. The mortgage deed was registered. After death of Jadeja Ranchhodji Harisangji, his son Junaji succeeded to the property of Jadeja Ranchhodji Harisangji, but for one reason or the other, he went to Africa for earning his livelihood. His wife Baluba alias Monghiba was living in

India. On 10/5/1940, she executed second mortgage deed (Exh.109) in favour of the mortgagees extending the period for redemption from 25 years to 80 years. Thereafter, an agreement-to-sale was executed in favour of one Mehta Ramniklal Madhavlal and thereafter, in terms of that Agreement, a sale document was executed in favour of Thakkar Karsandas Kanjibhai for a sum of Rs.966/- vide Exh.111 on 16/5/1958. It was submitted that Junaji husband of Baluba had expired in Africa somewhere in the year 1947. Thereafter, Thakkar Karshandas Kanjibhai through his power of attorney holder sold the property / equity of redemption of mortgage in favour of the plaintiff for a sum of Rs.1000/- vide Exh.98 dtd.1/5/1964.

4. The plaintiff, thereafter, filed the suit for redemption of mortgage. The plaintiff contended that he being holder of equity of redemption, was entitled to redeem the property. However, the defendants raised an objection that they were tenants in the property and under the circumstances, the order of redemption could not be made. The plaintiff, thereafter, amended the plaint by introducing facts relating to the second mortgage created by Baluba wife of Junaji. It was submitted that if in the

year 1940 there was yet another mortgage, the defendants could not assert that they were tenants in the property. It was also submitted by the plaintiff that the period of 80 years tantamount to clog on equity of redemption, condition of Baluba was hand to mouth and she needed money and under the circumstances, being oppressed by her financial condition, she had extended the period to 80 years. The period so fixed would amount to clog on equity of redemption. As observed, the defendants raised many fold objections. The learned trial court, after hearing the parties, dismissed the said suit. Thereafter, Regular Civil Appeal No.64 of 1971 was filed in the court of District Judge, Bhuj. The learned first appellate court framed certain issues and called for certain findings from the trial court. After receiving the said findings, the learned appellate court considered the same and dismissed the appeal on 11/8/1975. Second Appeal No.382 of 1975 was filed by the present appellant which was allowed by the learned Single Judge of this Court vide judgment and order dtd.20/7/1979. The learned Judge observed that in view of the defence raised by the defendants that they were tenants, the learned appellate court was required to consider the said aspect

and call for the report-cum-finding-cum-order from the Agricultural Lands Tribunal under sec.85 of Bombay Tenancy and Agricultural Lands Act. After remand, the learned first appellate court called for the said finding. The learned Agricultural Lands Tribunal held that the present defendants were not in possession of the property as tenants, but, in fact, they were mortgagees. The learned first appellate court again heard the parties and despite the said findings, dismissed the appeal on 22/4/1983.

5. The learned first appellate court held that the suit was not barred by limitation, the defendants were not tenants, the plaintiff would have a right to redeem, but it held that the suit was premature in view of the period fixed for redemption.

6. Being aggrieved by the said judgment and decree, the plaintiff has filed this Second Appeal and the defendants have filed Cross Objections under Rule 22 of Order 41 of the Code of Civil Procedure.

7. Mr.Avinash K. Mankad, learned counsel for the appellant submits that the learned courts below erred in not appreciating that the suit could not be held to be premature, because the plaintiff all through had been

asserting that the period of 80 years was, in fact, a clog on equity of redemption. It was also submitted that in the present case, second mortgage deed of 1940 executed by Baluba wife of Junaji Jadeja was not valid, because her husband was alive and under the law, Baluba could not execute the second mortgage deed. It is also submitted that if the second mortgage deed is invalid, then, the period of 25 years would expire in the year 1957 and the suit within 30 years dtd.1/9/1957 would be within limitation. It is the submission that if it is held that the second mortgage deed is valid, then too, this Court should hold that the period of 80 years would amount to clog on equity of redemption in view of special facts of the case.

8. Mr.P.V. Hathi, learned counsel for the respondents submits that if the plaintiff has brought the fact about the extension of redemption period, then they would be bound by their own admission. It is also submitted that the suit, in fact, is premature, because, the period for redemption is fixed at 80 years and the said period would expire somewhere in the year 2012. He also submits that the findings recorded by the two courts are justified and the plaintiff's suit was rightly dismissed. He also placed

his reliance upon a Division Bench Judgment of this Court in the matter of Sangar Gagu Vs. Shah Laxmiben Tejshi & ors., reported in 2001 (1) G.L.R. 697, to contend that so long as the court does not hold that a long period would amount to clog on equity of redemption, the suit cannot be decreed.

9. From the facts narrated above, it is clear that the property belonged to one Jadeja Ranchhodji Harisangji who had mortgaged the same vide Ex.92 on 26/7/1932 in favour of Keshra Harji, Predecessor-in-title of the defendants. The said period originally fixed, was to expire in the year 1957. The limitation for redemption under the Indian Limitation Act, 1908 was 60 years, which came to be shortened to 30 years under the Indian Limitation Act, 1963. The new Limitation Act provided that the period of limitation which had already expired and the period is extra large in the new Act, would not help, in case, where the limitation is lost. It also provided that the period of limitation which was to remain in favour of the plaintiff on the date of the enforcement of the Act of 1963, was to expire before 1/1/1964, then such person could file the suit within three years. It also provided that the limitation which was extra large under the old Limitation Act, if was

still to survive, it would stand curtailed to the period as provided in different Schedule appended to Indian Limitation Act, 1963. Accordingly, the period of limitation for redemption of the immovable property was curtailed from 60 years to 30 years. Assuming for a minute that the limitation for redemption was to expire within three years from the date of coming into force of Indian Limitation Act 1963 Act, the suit filed on 1/10/1964 would have been within limitation.

10. The learned first appellate court has held that the suit could not be held to be barred by limitation. The observations made by the learned first appellate court are that the suit deserves to be dismissed, being premature.

11. From the facts, it clearly appear that Jadeja Ranchhodji Harisangji, after his death, was succeeded by his son Junaji Ranchhodji Jadeja. The said Junaji Ranchhodji Jadeja settled in Africa for earning his livelihood. On 10/5/1940, second mortgage deed was executed by Baluba wife of Junaji Jadeja, extending the period from 25 years to 80 years. According to the plaintiff, during life time of Junaji Ranchhodji Jadeja, Baluba wife of Junaji Ranchhodji Jadeja had no right, title or interest in the property, nor could

she create any charge over the property, nor could extend the period of limitation. It is the say of the plaintiff that Junaji Ranchhodji Jadeja died somewhere in the year 1947. There is no evidence contrary to this that Junaji Ranchhodji Jadeja had expired before 1940 making Baluba Junaji Jadeja as absolute owner of the property. If in the year 1940, Baluba had no authority, right, title or interest in the property to create a mortgage or extend the period of existing mortgage, then, the second mortgage deed would not advance the case and cause of the defendants.

12. From the facts it would clearly appear that the second mortgage of 10/5/1940 was not to confer any right, title or interest in favour of the defendants, because, Baluba Junaji Jadeja, mortgagor herself had no right to execute the mortgage deed.

13. If the mortgage deed of 1940 is taken to be invalid or executed by a person who had no authority, then, the original period of redemption would be 25 years, which would come to an end in the year 1957. Within a period of 30 years from 1957, the plaintiff – purchaser of equity of redemption could always file a suit. Such a suit could not be said to be premature or barred by limitation.

14. The learned first appellate court wrongly and illegally had raised presumption about civil death of Junaji Ranchhodji Jadeja. The learned Judge held that from the year 1966 if the period of 18 years is reduced, then, the period would go back to 1947-48 and then the presumption would be that Junaji Ranchhodji Jadeja had expired. In the opinion of this Court, the learned first appellate court did not properly appreciate the law relating to presumption. A civil death can be presumed if within a period of seven years, a person has not been heard about and there is no information that such a person is alive, to such relations or persons, who ordinarily would have received such information. To justify the mortgage deed of 1940, the defendants were required to prove that right from 1932 or 1933 at best, Junaji Ranchhodji Jadeja was not heard by anybody and a presumption of civil death could be raised in relation to death of Junaji Ranchhodji Jadeja.

15. In the present case, unfortunately from the side of the defendants, there is nothing on the record to show or suggest that at least for a period of seven years, Junaji Ranchhodji Jadeja was not heard of by anybody. In fact, from the evidence on record, it would clearly appear that Junaji Ranchhodji Jadeja had died somewhere in the year

1947.

16. So far as the argument of Mr.Hathi, learned counsel based on Sangar Gangu (supra) is concerned, it must be appreciated in light of the law discussed by the Full Bench of this Court. The Full Bench does not say that in each and every case, suit would be premature, if it is filed before time fixed in the mortgage deed. The Court had observed that a suit filed with combined relief of removal clog of equity of redemption and granting consequential relief of redemption within the period fixed for redemption, cannot be held by barred by limitation because, in such suit, period of limitation of 30 years as provided under Article 61(a) would commence only when the Court comes to the conclusion that the terms in the mortgage deed and the period fixed for redemption is inequitable and amount to clog and the same deserves to be lifted.

17. In the present case, the plaintiff's case is that Baluba was oppressed by her condition, she was fighting to survive, she was living hand to mouth and under the circumstances, she had executed the second mortgage. If all these facts are taken into consideration, then, it would clearly appear that Baluba wife of Junaji Jadeja had

no advisor, she had no source of income and oppressed by the circumstances, she was required to execute the second mortgage, even without authority of law during the life time of her husband. The terms on which the period was extended from 25 years to 80 years, cannot be held tobe valid, specially when the defendants have not satisfied the court as to why the period was so extended in case of helpless woman who is otherwise illiterate also.

18. Taking into consideration the totality of the circumstances, I must hold that the second mortgage deed dtd.10/5/1940 was not valid mortgage deed and under the said deed, the period would not stand extended from 25 years to 80 years, the suit filed on 1/10/1964 was within limitation and was not premature.

19. Even if the mortgage deed dtd.10/5/1940 is taken to be valid, then, it is clear that the period of 80 years for redeeming the mortgaged property would be a clog on the equity of redemption. The plaintiff for the reasons aforesaid, certainly would be entitled to a preliminary decree for redemption. In the alternative, if the second mortgage deed dtd.10/5/1940 is held to be valid and under the authority of law, then too, the terms of the

mortgage deed and the period fixed in the mortgage would amount to clog on equity of redemption and under such circumstances, the present plaintiff who happens to be purchaser of the equity of redemption would be entitled to a decree for redemption.

20. For the reasons aforesaid, in the opinion of this Court, the suit filed by the plaintiff deserves to be decreed.

21. The appeal is allowed. The impugned judgment and decree passed by the two courts below are hereby set aside and the suit of the plaintiff is hereby decreed. The plaintiff is held entitled to redeem the property, well described in the plaint, on payment of Rs.2733.33 ps. (Rupees Two Thousand Seven Hundred Thirty Three and Thirty Three Paise only). The cross objections filed by the defendants are hereby dismissed. The parties to bear their own costs all through out. Let an appropriate decree be framed.

22. From the facts of the case, it would clearly appear that the suit was filed on 1/10/1964 and the mortgage was created in the year 1932. From the date of the suit, almost about 42 years have passed and from the date of creation of mortgage, about 74 years have passed. If such is the situation, then, on an application by the

plaintiff for final decree, the trial court shall see that the proceedings come to an end, preferably within a period of nine months from the date of appearance of the defendants.

(R.S. GARG, J.)

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